

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

## **VENSON LANE MYERS,**

Plaintiff,

V.

L. E. SCRIBNER, et al.

### Defendants.

Case No. 09cv1425 WQH (PCL)

# **REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS**

J.

## INTRODUCTION

18 Plaintiff, Venson Lane Myers (“Plaintiff”), a prisoner proceeding *pro se* and *in forma  
pauperis*, filed a Complaint against Defendants under Title 42, United States Code § 1983 for  
19 violations of his First Amendment right to free exercise of religion and violations of his rights  
20 under the Religious Land Use and Institutionalized Persons Act. (Doc. No. 1.) Defendants filed  
21 a Motion to Dismiss the Complaint on exhaustion grounds and for failure to state a claim under  
22 federal law. (Doc. No. 10.) Upon reviewing the Complaint, Defendants’ Motion and Plaintiff’s  
23 Opposition, the Court recommends Defendants’ Motion to Dismiss be GRANTED.  
24

II.

## BACKGROUND

## A. Factual Background

The following factual background is taken verbatim from the District Court's Order dismissing Plaintiff's first complaint:

On approximately July 7, 2007, Plaintiff considered organizing a Christian-based celebratory feast. (*Comp.*, 4[footnote omitted].) Plaintiff alleges that based on his research of prison rules and regulations, inmate religious groups are permitted no more than two religious events each year where the prison provides foods with religious significance. (*Id.*)

On August 23, 2007, Plaintiff[] discussed his planned religious feast with the Associate Warden, Defendant Builteman. (Compl., 3.) Defendant Builteman told Plaintiff to submit a proposal to the prison chaplain, Defendant Richey, for consideration. (*Id.*)

On or about September 24, 2007, Plaintiff submitted a request for administrative approval of a religious food feast on December 8, 2007 for 800 members of the Christian inmate community. (*Compl.*, 12.) After various communications with Prison officials, on October 3, 2007, Plaintiff was notified by Defendant Buileman that the proposal for a December 8, 2007 Christian feast was denied. (*Id.*, 5, 9.)

On October 8, 2007, Plaintiff filed a formal first-level appeal, designated as CAL-A-07-01891, concerning the denial of the proposed Christian feast. (*Compl.*, 10.) On October 14, 2007, Plaintiff filed an additional formal appeal, to be attached to the previous appeal (CAL-A-07-01891). (*Id.*,13.) On October 24, 2007, a formal hearing was held on Plaintiff's appeal. (*Id.*, 3, 15.)

On December 12, 2007, Defendant Buileman issued a formal decision acknowledging that the Christian faith places religious significance on “celebration bread and wine (juice)” in accordance with the Lord’s Supper and granting, in part, the appeal. (*Report*, 3.) The decision, therefore, stated that such a ceremony would be allowed. (*Id.*) But the decision denied the proposed attendance of 800 inmates, citing safety and security concerns, and denied Plaintiff’s claim that Chaplain Richey cancelled worship services in retaliation for the appeal. (*Id.*) Finally, the decision also informed Plaintiff that “the issue may be submitted at the Second Level of Review.” (*Compl.*, 15.)

Myers v. Scribner, 2009 U.S. Dist. LEXIS 24298, \*2-\*3 (2009).

**B. Plaintiff's First Federal Complaint**

Following this sequence of events, on January 18, 2008, Plaintiff filed his first complaint in federal court alleging violations of his constitutional rights identical to those alleged in the instant complaint. Myers v. Scribner, 2009 U.S. Dist. LEXIS 24298 (2009) (Southern District of California, Case No. 08cv0117 W (WMC).) Defendants filed a Motion to Dismiss that

1 complaint for failure to exhaust administrative remedies and failure to state a claim. (Id.) On  
 2 March 23, 2009, the District Court granted Defendants' Motion to Dismiss on grounds that  
 3 Plaintiff had failed to exhaust administrative remedies and dismissed Plaintiff's complaint  
 4 without prejudice. Myers v. Scribner, 2009 U.S. Dist. LEXIS 24298 (2009). In the Order  
 5 granting the Motion to Dismiss, the Court noted "the lawsuit is dismissed without prejudice so  
 6 that Plaintiff may refile the litigation if he exhausts administrative remedies." (Id. at \*7, Fn. 2.)

7 Thereafter, on March 29, 2009, Plaintiff requested a Second-Level review of his 602  
 8 grievance form previously submitted on October 8, 2007. (Doc. No. 1-1, 3.) Plaintiff claimed  
 9 he was "dissatisfied with the outright denial of the requested feast" and requested an appeal of  
 10 the grievance he had submitted 17 months prior. (Id.) On April 1, 2009, Plaintiff's request was  
 11 screened out at the Second Level because "[t]here has been too great a TIME LAPSE between  
 12 when the action or decision occurred and when you filed your appeal with no explanation of why  
 13 you did not or could not file in a timely fashion." (Doc. No. 1-1, 5.) Plaintiff was further  
 14 instructed that to continue to pursue this matter, he must "submit an explanation and supporting  
 15 documentation explaining why you did not or could not file your appeal timely." (Id.) Four  
 16 days later, on April 5, 2009, Plaintiff drafted a note to the Appeals Coordinator stating: I'm  
 17 submitting this 602 for exhaustion purposes! Your form required an explanation before  
 18 proceeding so now you can give your final finding on the issue." (Id. at 6.) Plaintiff's appeal  
 19 was screened out again on April 9, 2009 stating the following reason:

20 Upon review of this issue it is noted the alleged incident occurred in 2007, and you  
 21 failed to resubmit your appeal within 15 days of receiving the 1st Level Response on  
 12/14/2007. Therefore, this appeal cannot be accepted.

22 (Id. at 7.) Plaintiff's documents submitted in support of his complaint do not reference any  
 23 further action by Plaintiff on this issue.

24 **C. Plaintiff's Second Federal Complaint**

25 Plaintiff filed the instant complaint on June 30, 2009. (Doc. No. 1.) On October 28,  
 26 2009, Defendants filed a Motion to Dismiss alleging Plaintiff had failed to exhaust  
 27 administrative remedies and had otherwise failed to state a claim. (Doc. No. 10.) On November  
 28 30, 2009. Plaintiff opposed the Motion. (Doc. No. 12.)

III.

## DISCUSSION

#### A. Legal Standard

The Prison Litigation Reform Act of 1995 (PLRA) amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). Even when a prisoner seeks relief not available in grievance proceedings, notably monetary damages, exhaustion is a prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741 (2001). Similarly, exhaustion is a prerequisite for all prisoner suits regarding the conditions of their confinement, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter, 534 U.S. at 532.<sup>1/</sup>

The PLRA requires proper exhaustion of administrative remedies. Woodford v. Ngo, 548 U.S. 81, 83 (2006). “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.” Id. at 90-91. Thus, compliance with prison grievance procedures is required by the PLRA to properly exhaust. Id. The PLRA’s exhaustion requirement cannot be satisfied “by filing an untimely or otherwise procedurally defective administrative grievance or appeal.” Woodford, 548 U.S. at 84. “The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.” Jones v. Bock, 549 U.S. 199, 218 (2007).

25       1. These remedies need not meet federal standards, nor must they be “plain, speedy and  
26 effective.” Porter, 534 U.S. at 524 (citations omitted); Booth, 532 at 739-40 & n.5 (2001). The  
27 obligation to exhaust persists as long as some remedy is available; when that is no longer the case,  
28 the prisoner need not further pursue the grievance. Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir.  
2005); Marella v. Terhune, 568 F.3d 1024, 1028 (9th Cir. 2009) (finding an inmate’s claim fully  
exhausted when it was summarily denied for untimeliness and he was given no recourse for further  
appeal).

1           The State of California provides its prisoners the right to appeal administratively “any  
 2 departmental decision, action, condition or policy perceived by those individuals as adversely  
 3 affecting their welfare.” CAL. CODE REGS. TIT. 15, § 3084.1(a). It also provides them the right to  
 4 file appeals alleging misconduct by correctional officers and officials. Id. § 3084.1(e). In order to  
 5 exhaust available administrative remedies within this system, a prisoner must proceed through  
 6 several levels of appeal: (1) informal resolution, (2) formal written appeal on a 602 inmate  
 7 appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal  
 8 to the Director of the California Department of Corrections and Rehabilitation. Barry v. Ratelle,  
 9 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing CAL. CODE REGS. TIT. 15, § 3084.5). A final  
 10 decision from the Director’s level of review satisfies the exhaustion requirement under §  
 11 1997e(a). Id. at 1237-38.

12           Lastly, non-exhaustion under § 1997e(a) is an affirmative defense which should be  
 13 brought by defendants in an unenumerated motion to dismiss under Federal Rule of Civil  
 14 Procedure 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint  
 15 may be dismissed by the court for failure to exhaust if a prisoner “conce[des] to nonexhaustion”  
 16 and “no exception to exhaustion applies.” Id. at 1120.

17 **B. Analysis**

18           Defendants argue Plaintiff did not properly exhaust his administrative remedies prior to  
 19 the filing of this complaint as mandated by § 1997e(a). Specifically, they contend Plaintiff’s  
 20 attempts to exhaust are deficient because the record includes no final decision at the Director’s  
 21 level. In response, Plaintiff contends that a “perfected appeal grievance is unobtainable” in this  
 22 action because his attempt to appeal his initial 602 grievance to the second level of review was  
 23 not accepted for untimeliness. (Doc. No. 12, 2.) Plaintiff further contends that the first level  
 24 decision was rendered on December 14, 2007, clearly past the date of December 8, 2007 which  
 25 is the date of the proposed religious feast. (Id.) The Court notes Plaintiff does not allege any  
 26 undue hardship or unusual circumstance prevented him from filing a timely appeal.

27           The record shows Plaintiff attempted to appeal his initial 602 grievance on March 29,  
 28 2009, six days following the District Court’s Order of March 23, 2009 dismissing his complaint

1 for failure to exhaust administrative remedies. Myers v. Scribner, 2009 U.S. Dist. LEXIS 24298  
 2 (2009). Plaintiff was denied review at the second level for failure to submit his appeal within the  
 3 15 day period after receiving a response to his 602 grievance on December 14, 2007. (Doc. No.  
 4 1-1, 5.) When Plaintiff attempted to comply with the Appeals Coordinator's instructions, he did  
 5 not offer any explanation as to why he was unable to file an appeal within the time frame  
 6 specified in the decision rendered on his initial grievance. (Id. at 6.) Rather, Plaintiff merely  
 7 stated he was submitting this appeal for exhaustion purposes. (Id.) On April 9, 2009, his request  
 8 for second level review was rejected as untimely. (Id. at 7.)

9 In this case, it appears that Plaintiff failed to exhaust the administrative remedies  
 10 available to him. First, he failed to submit a request for appeal of the initial decision on his 602  
 11 grievance within the fifteen day time limit indicated on the response he received on December  
 12 12, 2007. Second, when he attempted to appeal that initial decision of his grievance, 15 months  
 13 after receiving the initial decision, his appeal was screened-out with a request to clarify what  
 14 circumstances prevented him from filing a timely request for appeal. The only event or action he  
 15 detailed in his response, by his own admission, was that he was filing a request for appeal of the  
 16 initial decision for exhaustion purposes. He did not offer any explanation as to why he waited  
 17 almost 15 months to appeal the initial decision. Furthermore, he made no attempt to cure the  
 18 defects in his current request for appeal or to submit a request for review at the third level. The  
 19 instructions on the screening form were clear: "if you would like to pursue this matter further,  
 20 you must submit an explanation and supporting documentation explaining why you did not or  
 21 could not file your appeal timely." Lastly, although the form states: "you failed to resubmit your  
 22 appeal within 15 days of receiving the 1st Level Response on 12/14/2007[, t]herefore, this appeal  
 23 cannot be accepted," Plaintiff was not precluded from filing a new grievance. Nothing on the  
 24 face of the screening form can be construed as informing Plaintiff that any attempt to pursue this  
 25 matter was futile because he could have submitted a 602 with supporting documentation or an  
 26 explanation regarding the time lapse between the action and the grievance submission.

27 The Court also finds the Ninth Circuit's decision in Marella v. Terhune instructive. 562  
 28 F.3d 983 (9th Cir. 2009). In that case, plaintiff Marella's administrative grievance was denied at

1 the initial stage as untimely because it was filed thirty-three days after the incident. *Id.* at 1026.  
 2 The screening form Marella received after the denial included the following language: “[t]his  
 3 screening action may not be appealed unless you allege the above reason is inaccurate.” *Id.* at  
 4 1027. Marella acknowledged that the grievance was untimely; therefore, he lacked any grounds  
 5 for appeal. *Id.* However, Marella argued that during the period in which his grievance would  
 6 have been timely, he had been hospitalized and was segregated. *Id.* at 1026. As a result, Marella  
 7 claimed that he lacked both access to the appropriate forms and knowledge of the procedural  
 8 requirements. *Id.* The district court dismissed Marella’s case for failure to exhaust, however, the  
 9 Ninth Circuit reversed and remanded the action. The Court noted that “if the district court finds  
 10 that [Marella] had the opportunity and ability to file his initial grievance timely, but failed to do  
 11 so, his case should be dismissed.” *Id.* at 1028. The Marella Court cautioned against rigidly  
 12 applying the requirements of proper exhaustion, or finding “no exceptions to the timely filing  
 13 requirement exist.” *Id.* at 1027.

14 The circumstances presented in this case are distinguishable from Marella but the Court’s  
 15 instruction applies. Unlike Marella, the record in this case demonstrates that Plaintiff had the  
 16 opportunity and ability to properly exhaust, but failed to do so. Plaintiff was expressly informed  
 17 upon receipt of the decision rendered on his initial complaint that he had the option to appeal the  
 18 decision. (Doc. No. 1-1, 3.) The document noting the decision included instructions on how to  
 19 properly pursue his grievances.<sup>27</sup> *Id.* Rather than following those instructions, Plaintiff decided  
 20 to bypass the second level of review by filing suit directly in federal court one month following  
 21 the decision. Myers v. Scribner, 2009 U.S. Dist. LEXIS 24298 (2009). When that attempt  
 22 resulted in a dismissal of his complaint, Plaintiff rushed to submit a request for second level  
 23 review to the appeals coordinator; 15 months after the initial decision. (Doc. No. 1-1, 2-3.) As a  
 24 result, and following Plaintiff’s failure to account for his delay, this request was screened out as  
 25 untimely. (*Id.* at 7.) As in Marella, Plaintiff received a screening form containing language that

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27           2. . At Section F, the Inmate/Parolee Appeal Form states: “If dissatisfied, explain reasons  
 28 for requesting a Second-Level Review, and submit to Institution or Parole Region Appeals  
 Coordinator *within 15 days of receipt of response.*” (Doc. No. 1-1, 3) (emphasis added).

1 stated that his appeal would not be accepted at this level due to the time lapse between the  
 2 decision and the request for appeal. However, unlike the plaintiff in Marella, Plaintiff never  
 3 cited any exceptional circumstances that prevented him from filing a timely grievance and  
 4 appeal. Plaintiff's "explanation" to the appeals coordinator does not qualify as an explanation.  
 5 (Doc. No. 12, 2.) Plaintiff's second level appeal lacks allegations of hardship or special  
 6 circumstance as to why he could not file within the 15 day period following the initial denial.  
 7 (Doc. No. 1-1, 6.) Therefore, because Plaintiff "had the opportunity and ability to file his initial  
 8 grievance timely, but failed to do so, his case should be dismissed." Marella, 562 F.3d. at 1028.

9 Moreover, Plaintiff's knowledge of the appeals process is carefully documented in that he  
 10 had submitted two accepted appeals to the third level of review prior to this incident. (See  
 11 Appellant Appeal History, Exhibit A to Decl. Of N. Grannis, Doc. No. 10-2, 6.) That fact further  
 12 distinguishes the instant action from Marella in that Plaintiff demonstrated his knowledge of and  
 13 access to the proper administrative appeal forms and procedures. Even if Plaintiff were asserting  
 14 that the grievance process was closed to him because his appeal had been "screened out," the  
 15 record shows that Plaintiff successfully utilized the grievance procedures prior to 2007. Plaintiff  
 16 not only filed several grievances, but two resulted in review at the third level. (Doc. No. 10-2, 6.)

17 In sum, the law is clear that a prisoner must complete the administrative review process  
 18 in accordance with the applicable procedural rules, including deadlines, as a precondition to  
 19 bringing suit in federal court. Woodford, 548 U.S. at 83-83. Although Plaintiff contends he was  
 20 unable to appeal because the date of the proposed event had passed, even when a prisoner seeks  
 21 relief not available in grievance proceedings, exhaustion is a prerequisite to suit. See Porter, 534  
 22 U.S. at 524. Plaintiff deliberately abandoned the proper course of appeal in violation of the  
 23 prison's procedural rules for filing grievances and attempted to bypass the second level of  
 24 review. Plaintiff has failed to exhaust administrative remedies available to him; therefore, his  
 25 complaint should be DISMISSED.

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IV.

## CONCLUSION

3 For the reasons set forth above, the Court recommends Defendants' Motion to Dismiss be  
4 **GRANTED**; and Plaintiff's Complaint be dismissed without prejudice. This Report and  
5 Recommendation is submitted to United States District Judge William Q. Hayes, pursuant to 28  
6 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the  
7 Southern District of California.

8 Any written objections to this Report and Recommendation must be filed with the Court  
9 and a copy served on all parties on or before June 15, 2010. The document should be captioned  
10 "Objections to Report and Recommendation."

11 Any reply to the objections shall be served and filed on or before June 29, 2010. The  
12 parties are advised that failure to file objections within the specified time may waive the right to  
13 raise those objections on appeal of this Court's order. Martinez v. Ylst, 951 F.2d 1153, 1156  
14 (9th Cir. 1991).

## **IT IS SO ORDERED.**

16 | DATE: May 24, 2010

  
Peter C. Lewis